Supreme Court, U.S.
FILED

(1)

97-204 JUL 31 1997

OFFICE OF THE CLERK

Docket No.

IN THE SUPREME COURT OF THE UNITED STATES

KEENA WHITE, by her Personal Representative,Cindy White, CINDY WHITE, Individually, and Cindy White as Guardian ad Litem for DEIDRE JONES, CLIFFORD WHITE, JR., PATRIC WHITE, DANIEL WHITE, and DARREN WHITE,

Petitioners,

-- against --

RUBY CHAMBLIS; TINA WERTS; TANGA GILCHRIST; CLARENCE GRAHAM; CASSIE WILSON; MARIE DUNNAM; RAMONA FOLEY; BARRY DOWD; WILBERT LEWIS; JAMES C. SOLOMON, JR.; JOANNE SCHAEKEL; DESIREE COUNCIL,

Respondents,

-- and --

ANTHONY BONNER, GLADYS BONNER, and TONY BONNER,

Defendants.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Sally M. Walker
Counsel for Petitioners
1518 Pickens Street
Columbia, South Carolina 29201
(803) 254-1677

39 pp

QUESTIONS PRESENTED

I. IS ESTABLISHMENT OF A STATE CHILD PROTECTION PROGRAM WHICH INCLUDES THE ESTABLISHMENT OF FOSTER HOMES AND THE INVOLUNTARY REMOVAL OF CHILDREN FROM THEIR PARENTS SUFFICIENT STATE ACTION, STATE CUSTODY, CREATION OF A KNOWN DANGER AND/OR THE RENDERING OF A CHILD MORE VULNERABLE TO A DANGER, SUCH AS TO IMPOSE A CORRESPONDING CONSTITUTIONAL DUTY OF RESPONSIBILITY ON THE STATE FOR THE REASONABLE SAFETY AND WELL BEING OF A CHILD IN FOSTER CARE AS SET FORTH IN THE PRINCIPLES OF YOUNGBERG AND ESTELLE?

II. DOES 42 U.S.C. § 1320a-2 (1994) SUPERSEDE SUTER V. ARTIST SUCH THAT PROVISIONS OF THE ADOPTIONS ASSISTANCE AND CHILD WELFARE ACT OTHER THAN § 671(A)(15) CREATE PRIVATELY ENFORCEABLE RIGHTS?

III. DOES A CHILD INVOLUNTARILY PLACED IN FOSTER CARE HAVE FEDERALLY ENFORCEABLE PROCEDURAL DUE PROCESS RIGHTS, WHERE THE STATE CHILD PROTECTION STATUTE HAS GRANTED THE CHILD AN ENTITLEMENT TO RECEIVE PROTECTIVE SERVICES?

LIST OF PARTIES

Petitioners: Keena White (deceased), by her Personal Representative, Cindy White; Cindy White, Individually; Cindy White as Guardian Ad Litem for Deidre Jones, Clifford White, Jr., Patric White, Daniel White, Darren White.

Respondents: Ruby Chamblis; Tina Werts; Tanga Gilchrist; Clarence Graham; Cassie Wilson; Marie Dunnam; Ramona Foley; Barry Dowd; Wilbert Lewis; James C. Solomon, Jr.; Joanne Schaekel; Desiree Council.

Defendants: Anthony Bonner; Gladys Bonner; Tony Bonner

TABLE OF CONTENTS

QUESTIONS PRESENTED ii

LIST OF PARTIES iv

TABLE OF CONTENTS v

TABLE OF AUTHORITIES viii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

FEDERAL STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

A. BRIEF SUMMARY OF THE FACTS 2

B. DETAILED FACTUAL SUMMARY 3

ARGUMENTS 6

I. THE ESTABLISHMENT OF A STATE CHILD PROTECTION PROGRAM WHICH INCLUDES THE ESTABLISHMENT OF FOSTER HOMES AND THE INVOLUNTARY REMOVAL OF CHILDREN FROM THEIR PARENTS IS SUFFICIENT STATE ACTION, STATE CUSTODY, CREATION OF A KNOWN DANGER AND/OR THE RENDERING OF A CHILD MORE VULNERABLE TO A DANGER SUCH AS TO IMPOSE A CORRESPONDING CONSTITUTIONAL DUTY OF RESPONSIBILITY ON THE STATE FOR THE REASONABLE SAFETY AND WELL BEING OF A CHILD IN FOSTER CARE 6

A. The Fourth Circuit is in direct conflict with several other Circuit Courts and the Supreme Court 6

B. The Fourth Circuit's Opinion is patently wrong 11

1. Foster Children are in the Custody of the State, and Foster Parents Act Under Color of State

Law. 11
2. The State's Custodial Relationship with the Foster Child Imposes an Affirmative Duty of Reasonable Protection in a Child's Placement as Well as While the Child Is in Foster Care. ... 15
3. The Fourth Circuit Erroneously Applied a Higher Standard of Liability to this Case. ... 18

II. THE FOURTH CIRCUIT'S DECISION THAT SUTER V. ARTIST PRECLUDES PRIVATE ENFORCEMENT OF ALL SECTIONS OF THE AACWA IS IN DIRECT CONFLICT WITH U.S.C. SECTION 1320a-2 AND PRIOR SUPREME COURT HOLDINGS AND IS PATENTLY WRONG. 21

III. THE FOURTH CIRCUIT FAILED TO RECOGNIZE PLAINTIFFS' PROCEDURAL DUE PROCESS CLAIMS AND IS IN DIRECT CONFLICT WITH OTHER CIRCUIT COURTS AND THE SUPREME COURT 24

IV. THE QUESTIONS PRESENTED ARE IMPORTANT BECAUSE THEY CONCERN A FUNDAMENTAL RIGHT OF VAST NUMBERS OF CHILDREN AND FAMILIES, INVOLVE THE ADMINISTRATION OF A COSTLY FEDERAL PROGRAM, AND IMPLORE THE COURT TO CLARIFY DESHANEY V. WINNEBAGO COUNTY DSS. 28

CONCLUSION 30

APPENDIX 1a

FOURTH CIRCUIT OPINION 1a
DISTRICT COURT OPINION 16a
ORDER DENYING REHEARING 19a
FOURTEENTH AMENDMENT 22a
42 U.S.C. § 1983 ..... 22a
42 U.S.C. § 627 ..... 22a
42 U.S.C. § 671 ..... 23a
42 U.S.C. § 672 ..... 26a

TABLE OF AUTHORITIES

U.S. SUPREME COURT CASES

Board of Regents v. Roth, 408 U.S. 564 (1972) 24, 25, 27

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) ... 11, 14

DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 109 S. Ct. 998 (1989) 9-11, 13, 16, 24, 25, 29, 30

Estelle v. Gamble, 429 U.S. 97 (1976) 7-9, 11, 13, 14, 16, 18, 24, 28-30

Farmer v. Brennan, 511 U.S. 825 (1994) 20

Hutto v. Finney, 437 U.S. 678 (1978) 15

Ingraham v. Wright, 430 U.S. 651 (1977) 15

Johnson v. Jones, 115 S. Ct. 2151 (1995) 18

Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) 12

Shelly v. Kraemer, 334 U.S. 1 (1948) 12

Smith v. Organization of Foster Families, 431 U.S. 816 (1977) 11

Suter v. Artist, 112 S. Ct. 1360 (1992) 21-24

West v. Atkins, 487 U.S. 42 (1988) 10-12, 14, 29

Wilder v. Virginia Hospital Association, 496 U.S. 498 (1990) 22, 23

Wright v. City of Roanoke Redevelopment and Housing Authority, 479 U.S. 418 (1987) 22, 23

Youngberg v. Romeo, 457 U.S. 307 (1982) 7-9, 11, 13-16, 18, 21, 29, 30

U.S. APPELLATE COURT CASES

Andrews v. Federal Home Loan Bank of Atlanta, 998 F.2d 214 (4th Cir. 1993) 14

Brice v. Virginia Beach Correctional Center, 58 F.3d 101 (4th Cir. 1995)

Buonocore v. Harris, 65 F.3d 347 (4th Cir. 1995) 18

Doe ex rel. Nelson v. Milwaukee County 903 F.2d 499 (7th Cir. 1990) 26

Doe v. New York City Department of Social Services, 649 F.2d 134 (2d Cir. 1981), cert. denied, 464 U.S. 864 (1983). 9, 13, 19

Finelli v. Tabb, 67 F.3d 67 (4th Cir. 1995) 18

Jensen v. Conrad, 747 F.2d 185 (4th Cir. 1984) 15

K.H. through Murphy v. Morgan, 914 F.2d 846 (7th Cir. 1990) 10

L.J. ex rel. Darr v. Massinga, 833 F.2d 118 (4th Cir. 1988) 13, 21, 23

Meador v. Cabinet for Human Resources, 902 F.2d 474 (6th Cir. 1990) 25

Milburn v. Ann Arundel County Department of Social Services, 871 F.2d 474 (4th Cir. 1989) 7, 13, 14

Mitchell v. Aluisi, 872 F.2d 577 (4th Cir. 1989) 14

Norfleet ex rel. Norfleet v. Arkansas Department of Human Services, 989 F.2d 289 (8th Cir. 1993) 10

Taylor ex rel. Walker v. Ledbetter, 818 F.2d 791 (11th Cir. 1987), cert. denied, 489 U.S. 1065 (1989) 7-9, 13, 19, 25, 30

Tony L. ex rel. Simpson v. Childers, 71 F.3d 1182 (6th Cir. 1995) . . . 26

Winfield v. Bass, 106 F.3d 525 (4th Cir. 1997) 18

Yvonne L. ex rel. Lewis v. New Mexico Department of Human Services, 959 F.2d 883 (10th Cir. 1992) 10

U.S. DISTRICT COURT CASES

B.H. v. Johnson, 715 F. Supp. 1387 (N.D. Ill. 1989) 26

Baby Neal v. Casey, 821 F. Supp. 320 (E.D. Pa. 1993) 26, 27

Child v. Beame, 412 F. Supp. 593 (S.D.N.Y. 1976) 26

Chrissy F. ex rel. Medley v. Mississippi Department of Public Welfare, 780 F. Supp. 1104 (S.D. Miss. 1991) 26, 28

Coker ex rel. Coker v. Henry, 813 F. Supp. 567 (W.D. Mich. 1993), aff'd, 25 F.3d 1047 (6th Cir. 1994) 26

Eric L. ex rel. Schierberl v. Bird, 848 F. Supp. 303 (D.N.H. 1994) ... 26

Harris v. James, 883 F. Supp. 1511 (M.D. Ala 1995) 22, 24

Jeannie B. By Blondis v. Thompson, 877 F. Supp. 1268 (E.D. Wis. 1995) 21, 23, 24

Marisol A. By Next Friend Forbes v. Giuliani, 929 F. Supp. 662 (S.D.N.Y. 1996) 21, 23, 26

Norman v. McDonald 930 F. Supp. 1219 (N.D.Ill. 1996) 24

Powell v. Georgia Department of Human Resources, 918 F. Supp. 1575 (S.D. Ga. 1996) 25

U.S. CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VIII 8, 12, 15, 29

U.S. Const. amend. XIV 7, 8, 15, 16, 24, 25, 27-30

FEDERAL STATUTES

108 Stat. 4058 (1994) 22

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1320a-2 ..... 21, 22

42 U.S.C. § 1983 ..... 22, 28

42 U.S.C. § 627 24

42 U.S.C. § 671 ..... 21, 23, 24

42 U.S.C. § 672 21

STATE COURT CASES

Babcock v. State, 809 P.2d 143 (Wash. 1991) 27

Davis v. McClaran, 909 S.W.2d 412 (Tenn. 1995) 24

Jensen v. Anderson County Department of Social Services, 403 S.E.2d 615 (S.C. 1991) 27, 28

STATE STATUTES

27 S.C. Code Ann. Regs. 114-550 (1992) 11

S.C. Code Ann. § 20-7-480 (Law. Co-op. 1976) 27

S.C. Code Ann. § 20-7-650 (Law. Co-op. 1976) 26

OPINIONS BELOW

The decision of the United States Court of Appeals, Docket Numbers 95-3025, 95-3078, and 95-3088 is reported at _____ F.3d _____ and is set forth in full in the Appendix at 1a. The opinion of the District Court is unreported and is also set forth in full in the Appendix at 16a.

STATEMENT OF JURISDICTION

The court of appeals rendered its decision on April 30, 1997. Rehearing was denied on May 28, 1997, and the mandate issued and took effect on June 5, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The federal statutes involved in this case are 42 U.S.C § 1983; 42 U.S.C. § 1320a-2; and 42 U.S.C. § 671 et. seq., all of which are set forth in full in the Appendix at 22a - 28a. The United States Constitutional provision involved is the Fourteenth Amendment, which is set forth in full in the Appendix at 22a.

STATEMENT OF THE CASE

By this petition, this Court is asked to review a decision of the United States Court of Appeals for the Fourth Circuit which held that the state may involuntarily remove children from their parent's custody without any corresponding duty to place the child in a reasonably safe environment and without any corresponding duty to monitor the child's welfare while in state custody absent actual knowledge of prior abuse by the foster parents. The Court is further asked to review the Fourth Circuit's decision that the South Carolina Child Protection Statute does not create an entitlement in foster children to procedural due process, and lastly, to review the Fourth Circuit's position that the Adoptions and Assistance Child Welfare Act creates no enforceable rights in foster children.

Stated differently, this Court is being asked to decide if children are merely "property" without any basic human rights or whether the "historic liberty interest" in the parent-child relationship is still valued in today's

society. This Court has always jealously guarded the individual's freedom and basic human rights especially in the prison/detention context. This case asks the Court to declare that children are individuals entitled to the same basic human rights of reasonable safety and well being as adults.

A. BRIEF SUMMARY OF THE FACTS

The state of South Carolina removed Keena White (age ten months) and her siblings from Cindy White's custody by ex parte order. A South Carolina Court gave DSS custody of Keena with placement authority. South Carolina law requires DSS and only DSS to select, license, train and monitor foster parents. None of the White children's foster homes met licensing regulations nor did any of them have the required training or monitoring. Keena and her siblings were not properly monitored during custody. Prior DSS agency reviews had found foster homes were not properly licensed, trained or monitored and that foster children were not monitored, which had resulted in numerous deaths. Keena's foster parents, the Bonners, had physically abused other foster children by hitting, slapping, locking in closets, and cursing them. Tony Bonner, the Bonner's adult son, had previously hit foster children in the head with his knuckles. Keena died of multiple blows to her head believed to be caused by an adult's knuckles. After Keena's death, DSS revoked the Bonner's foster home license and found that they caused Keena's death by child abuse. The Bonners are listed on the central registry as child abusers. DSS denies knowledge of prior abuse by the Bonners before Keena's death.

This lawsuit was filed under 42 U.S.C. § 1983 alleging procedural and substantive due process violations as well as violations of the Adoptions Assistance and Child Welfare Act to the Plaintiffs while in DSS custody.

B. DETAILED FACTUAL SUMMARY

On November 21, 1991 Cindy White's 18 month old son, Daniel sustained a spiral fracture to his arm when his arm got caught in the slats of his German slat bed. Because of the mandatory reporting laws, the hospital was required to call DSS and inform them of Daniel's injury. Defendant Gilchrist was assigned to investigate.

On November 22, the DSS Defendants contacted the Aiken County Sheriff's Department and requested that a deputy remove the White children

from their mother. The Sheriff's department sent a deputy to the White home. However, after examining the condition of the children, and establishing that there was adequate food and milk and that the children were in no apparent danger, the deputy refused to remove the children.

Defendants Gilchrist and her supervisor Defendant Chambliss then filed an ex-parte petition with the family court based solely on the possible abuse to Daniel based on the existence of a spiral fracture. There was no mention in the court petition of the White family's living conditions or possible neglect of the other White children nor that the Sheriff's deputy refused to remove the children. The petition was submitted to the family court and was granted by the judge on November 26, 1991, five days after the alleged abuse to Daniel occurred.

The children were removed by ex parte order on December 3, 1991, thirteen days after Daniel's injury. The removal was affirmed by the Court at a temporary hearing on December 4, 1991 and DSS was given temporary custody of the White children. Defendants answers admit that the children were in DSS custody from December 3, 1991 until Keena's death six weeks later on January 18, 1992.

By state statute, only DSS is authorized to license, train and monitor foster homes. The names and all information on foster parents is confidential, unavailable to the natural parents and the public. By statute, only DSS is authorized to place foster children in a foster home.

Once the Defendants removed the White children from their mother, they were placed in separate state-licensed foster homes and emergency shelters. None of the foster homes met the licensing requirements nor had the DSS Defendants correctly trained or supervised the foster homes. During the time the White children were in custody, the Defendants failed to adequately supervise their placements and failed to make required visits to the foster homes to check on their safety. The Defendants literally abandoned six (6) helpless children in the hands of untrained, unsupervised and abusive foster parents.

Keena White, ten (10) months old, was placed in the Bonner foster home where she received bruises on her forehead and beside her eye, as well as bite marks on her arms. She had a respiratory illness that was left untreated for two (2) or more weeks. The Bonners already had too many children in their home (eight) and were in violation of the licensing

requirements. The Bonners had not had the original nor yearly required training, Mr. Bonner drank excessive amounts of alcohol. Mr. Bonner and his adult son, who was living in the home with the knowledge and consent of DSS, would fight in the house, breaking furniture and throwing bottles at each other. Mr. Bonner would also threaten and hit Mrs. Bonner in front of the foster children. The Bonners would beat the children with sticks, belts and shoes for things such as wetting the bed. They would also lock the younger foster children in closets in the dark as punishment. The son particularly enjoyed hitting the children in the head with his fist as he walked by them. Tony Bonner had hit a foster child in the head with a brick, requiring stitches at the emergency room. At least two of the foster children carry scars inflicted on them by the Bonners to this day.

Keena White was murdered on January 18, 1992 in the Bonner foster home while still in the legal custody and care of the DSS Defendants. The Department of Social Services investigated Keena's death and determined that the Bonners abused Keena White, the other foster children placed in their home by DSS, and the Bonner's own grandchildren who were also living with them. The Bonners were placed on the Central Registry of child abusers and were determined by the Department of Social Services to have caused the death of Keena White by child abuse. Their foster home license was revoked by DSS

The other five White children were also abused and/or neglected while in DSS's custody. Three of the children required Emergency Room treatment: one for a urinary tract infection, one for bronchitis, and one for pneumonia. All of the children received some physical injury - bruises, cuts, belt marks.

The Defendants were made aware of the condition of the White children during their stay in foster care. Cindy White reported suspected abuse and/or neglect of her children to Defendants Graham, Werts, Gilchrist and Wilson in person while visiting her children on December 6, December 9, and December 23. Senator Strom Thurmond wrote Defendant Dunnam a letter reporting Cindy's observations of suspected neglect and/or abuse on December 20. Defendants Dunnam, Wilson, Graham, Chambliss and Gilchrist saw the letter. When Cindy could not get any help from these Defendants, she wrote a letter to the State DSS Office expressing her concern for the safety of her children and the abuse and/or neglect occurring in their foster care placements. Defendants Solomon, Dowd, Lewis, Foley, Schaekel and Council either saw or knew of this letter. Carol Heyes of the

Aiken County Delegation Office, at the request of State Senator Thomas Moore, spoke with Defendants Graham and Wilson regarding the abuse and/or neglect suffered by the White children while in foster care. Defendants did not investigate any of these reports and did not take any steps to ensure the White children's safety while in state custody.

By the January 24, 1992 hearing, there were only five children to consider because Keena had been murdered on January 18, 1992, while in DSS custody. Consequently, the Defendants offered to return all of Cindy's children to her if she would agree that "someone" abused Daniel and agree to various other requirements such as parenting classes and a psychological evaluation. With one of her children already murdered while in DSS' custody, Cindy was willing to sign any agreement that would get the rest of her children out of the clutches of DSS. Cindy's five remaining children were then returned to her without any changes having occurred in her parenting abilities prior to their return.

Cindy White then filed this law suit on November 18, 1993 on behalf of herself and her children, both living and deceased, alleging that the Defendants violated the White family's constitutional and federal statutory rights. After two years of discovery, which revealed many government studies of the Department of Social Services which detailed long-standing significant deficiencies in the areas of foster home licensing, foster care services, child protective services, and supervision, both Plaintiffs and Defendants filed Motions for Summary Judgment, all of which were denied by the District Court. Defendants Solomon, Lewis, Dowd (Webster), Foley, Council, Schaekel, Dunnam, Wilson, Chambliss, Graham, Werts, and Chambliss then filed notices of appeal as to the issue of Qualified Immunity on December 18, 1995. The Fourth Circuit heard oral arguments on March 6, 1997 and granted Defendant's appeal, dismissing the case on the grounds of Qualified Immunity. Petitioner then filed a petition for re-hearing *en banc* on May 14, 1997 which was subsequently denied.

ARGUMENTS

I. THE ESTABLISHMENT OF A STATE CHILD PROTECTION PROGRAM WHICH INCLUDES THE ESTABLISHMENT OF FOSTER HOMES AND THE INVOLUNTARY REMOVAL OF CHILDREN FROM THEIR PARENTS IS SUFFICIENT STATE ACTION, STATE CUSTODY, CREATION OF A KNOWN DANGER AND/OR THE RENDERING OF A CHILD MORE VULNERABLE TO A DANGER SUCH AS TO IMPOSE A CORRESPONDING CONSTITUTIONAL DUTY OF RESPONSIBILITY ON THE STATE FOR THE REASONABLE SAFETY AND WELL BEING OF A CHILD IN FOSTER CARE

A. The Fourth Circuit is in direct conflict with several other Circuit Courts and the Supreme Court

The Fourth Circuit has now held that foster children are entitled to no affirmative constitutional duty of protection while in state custody whether or not they were involuntarily placed in foster care. In this case, the foster child was seized and ordered into foster care by a state court and no duty to protect was found. In Milburn v. Ann Arundel County Department of Social Services, 871 F.2d 474 (4th Cir. 1989), the foster child was voluntarily surrendered by his parents, and no duty to protect was found. In the Fourth Circuit, a foster child is vulnerable and unprotected under any set of facts. However, several Appellate Courts have held, pursuant to Estelle v. Gamble, 429 U.S. 97 (1976), and Youngberg v. Romeo, 457 U.S. 307 (1982), that a State may be held liable under both the substantive and procedural provisions of the Due Process Clause of the Fourteenth Amendment for failing to protect children in foster homes from mistreatment at the hands of their foster parents. Because several circuits disagree on a fundamental federal constitutional right, and the degree to which that right will be enforced varies purely as a function of geographical location, certiorari should be granted.

The Eleventh Circuit in Taylor ex rel. Walker v. Ledbetter, 818 F.2d 791 (11th Cir. 1987), cert. denied, 489 U.S. 1065 (1989), held that the state's action in assuming responsibility of finding and keeping a child in a safe environment by removing a child from the custody of her natural parents placed an obligation on the state to ensure continuing safety of the

environment and any failure to do so constituted a deprivation of that child's Constitutional rights:

> In this case, the child's physical safety was a primary objective in placing the child in the foster home. The state's action in assuming the responsibility of finding and keeping the child in a safe environment placed an obligation on the state to insure the continuing safety of that environment. The state's failure to meet the obligation, as evidenced by the child's injuries, in the absence of overriding societal interests, constituted a deprivation of liberty under the fourteenth amendment.

818 F.2d at 795. In Taylor, Kathy Jo Taylor was removed by court order from her natural parents in 1982 and was placed in the custody of the Gwinnett County Department of Family and Children Services. The Department then placed Kathy Jo in a foster home where she suffered severe and permanent personal injuries as a result of being willfully struck, shaken, thrown down, beaten and otherwise severely abused by the foster mother.

Using Estelle and Youngberg as the basis of their analysis, the Eleventh Circuit found that the child had a substantive due process right under the Fourteenth Amendment to the Constitution to be free from the infliction of unnecessary pain and a fundamental right to physical safety. In Youngberg, the mother of a mentally retarded person involuntarily committed to a Pennsylvania state institution filed a complaint pursuant to §1983 alleging that the institution's officials knew or should have known that her son was suffering injuries. The Supreme Court recognized the child's liberty interest in the safety of his environment and noted that the right to personal security constitutes a historic liberty interest protected substantively by the due process clause. 457 U.S. 307. The Eleventh Circuit reasoned that a foster child's situation is analogous to Youngberg's in that in both cases the state involuntarily placed the person in a custodial environment and in both cases the person was unable to seek alternative living arrangements. 818 F.2d 791.

In Estelle, the Supreme Court held that prison officials who show deliberate indifference to a prisoner's serious illness or injury violated the eighth amendment's prohibition against the infliction of cruel and unusual punishment. Such a transgression gives rise to a prisoner's action under §1983. The Eleventh Circuit reasoned that a foster child involuntarily

placed in a foster home is in a situation so similar to that of a prisoner involuntarily placed in an institution that similar rules of law should be applied. The Eleventh Circuit stated, "Although the contacts between actors in the foster home situation are not as close as in the penal institution, the situations are close enough to be held analogous." Taylor, 818 F.2d at 796. The Eleventh Circuit concluded:

> In the foster home setting, recent events lead us to believe that the risk of harm to children is high. We believe the risk of harm is great enough to bring foster children under the umbrella of protection afforded by the fourteenth amendment. Children in foster homes, unlike children in public schools, are isolated; no persons outside the home setting are present to witness and report mistreatment. The children are helpless. Without the investigation, supervision, and constant contact required by statute, a child placed in a foster home is at the mercy of the foster parents."

818 F.2d at 797.

The Sixth Circuit has also held that foster children have a constitutional right to protection while in state custody. In Meador v. Cabinet for Human Resources, 902 F.2d 474 (6th Cir. 1990), the Court reasoned:

> Indeed, several Courts of Appeals have held ... that the State may be liable under the Due Process Clause for failing to protect children in foster homes from mistreatment at the hands of their foster parents. 109 S. Ct. at 1006 n. 9. Thus DeShaney clearly does not apply to the instant case .... We hold that due process extends the right to be free from the infliction of unnecessary harm to children in state-regulated foster homes.

Id. at 476. In Meador, three children were placed in the custody of the Kentucky Cabinet for Human Resources. The Cabinet then placed the three children in the Douglass Foster Home where they were sexually abused. The children then filed suit against the Cabinet under § 1983, alleging that the Cabinet violated their Constitutional rights by placing the children in a foster home where a previous foster child had been sexually abused. Relying on the analysis set forth in Taylor and Doe v. New York City Department of Social Services, 649 F.2d 134 (2d Cir. 1981), cert. denied, 464 U.S. 864 (1983), the Sixth Circuit held that : "due process extends the

right to be free from the infliction of unnecessary harm to children in state-regulated foster homes." Meador, 902 F.2d at 476.

The Second Circuit in Doe held that where a state official's deliberate indifference is a substantial factor in denying property or liberty interests, a child in foster care is in a situation analogous to a prisoner in state custody. Consequently state officials responsible for foster placement may be liable under section 1983. 649 F.2d at 141. In Doe, a foster child sued her legal custodian and a voluntary child welfare agency which provided foster care under a contract with the City of New York. The foster child alleged that state officials violated her constitutional rights when, with the knowledge of possible sexual abuse from her foster father, they failed to investigate or remove her from the foster home. Again relying on Youngberg and Estelle, the Second Circuit held:

> When individuals are placed in custody or under the care of the government, their governmental custodians are sometimes charged with affirmative duties, the nonfeasance of which may violate the Constitution. Thus nonperformance of such custodial duties has been held to give rise to a section 1983 case of action for prisoners."

649 F.2d at 140. See also; Norfleet ex rel. Norfleet v. Arkansas Dep't of Human Servs., 989 F.2d 289, 291-93 (8th Cir. 1993); Yvonne L. ex rel. Lewis v. New Mexico Dep't of Human Servs. 959 F.2d 883, 892-93 (10th Cir. 1992); K.H. through Murphy v. Morgan, 914 F.2d 846, 849-50 (7th Cir. 1990).

The Fourth Circuit opinion also conflicts with applicable decisions of this Court. Although the Fourth Circuit does not discuss specific cases or refer to U.S. Supreme Court precedent, the conflict is clearly apparent based on its decisions. The Fourth Circuit ruled that foster parents are private actors whose deeds are not attributable to DSS yet the decision failed to distinguish West v. Atkins, 487 U.S. 42 (1988), where a private physician was determined to act under color of law and his actions were attributable to the state. Further the Fourth Circuit has held that there is no duty of safe keeping and protection of the welfare of a child involuntarily in state custody. This Court has consistently held that when the state creates a dangerous situation, and/or when the state makes a person more vulnerable to a danger, and/or when the state infringes on an individual's liberty, the state assumes a corresponding duty of protection for the

person's well being and reasonable safety. Youngberg, Estelle, DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 109 S. Ct. 998 (1989). In the instant case, the state created a dangerous situation by its repeated failure to properly select, investigate, license, train, and monitor foster homes. Moreover, it rendered Keena White more vulnerable by its failure to properly visit and monitor her while she was in foster care. Obviously, the State infringed on Keena's liberty by removing her from her mother and requiring that she live with the Bonner foster parents. However, the Fourth Circuit found no liability.

In direct opposition to the Second, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits, the Fourth Circuit has now held that the state owes no duty of protection to a child placed in foster care because foster parents are private actors and harm inflicted by foster parents must be considered private violence. The Fourth Circuit has also held that deliberate indifference and/or lack or professional judgment are not factors in the selection, licensing, training, and monitoring of foster parents absent suspicion or knowledge of prior abuse. The Fourth Circuit has held that DSS is not required to take any responsibility whatsoever to determine the suitability of a child's placement. In fact, ignorance is bliss in the Fourth Circuit. The Fourth Circuit, like most others, has always recognized Youngberg in 1982, and Estelle in 1986 as creating a right to reasonable safety in any type of state custody. Likewise, DeShaney, recognized foster care as custody, but did not address the issue because those facts were not before the Court. However, this Court still noted that the creation of a danger or the rendering of an individual more vulnerable would impose liability. The Fourth Circuit's reasoning is in direct conflict with this Court's decisions in Youngberg, Estelle, and Deshaney, as well as the above-discussed circuit court decisions.

B. The Fourth Circuit's Opinion is patently wrong

1. Foster Children are in the Custody of the State, and Foster Parents Act Under Color of State Law.

The very act of foster parents retaining physical control of a foster child is possible only because they are clothed in the power of the state. The foster home license is a badge of state authority that permits one to restrict, control, and detain the child of another. The relationship between the foster parent and the foster child has its "origins in an arrangement in which the

State has been a partner from the outset." Smith v. Organization of Foster Families, 431 U.S. 816, 846 (1977). Foster care is a creature purely of statute, existing only at the behest of the state, and only for the purpose of conducting state business. See Smith, 431 U.S. at 856 (Stewart, J., concurring in judgment); See also 27 S.C. Code Ann. Regs. 114-550 (1992).

In Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), the Court found state action where a private restaurant refused service to Negroes, merely because the restaurant leased its facilities from the state. Here, the foster home accepts public funds from the state which are intended to benefit the foster child, who remains a ward of the state while in foster care.

In West, on certiorari to the Fourth Circuit, the Court found state action where a private physician treated state inmates under contract. 487 U.S. at 54. Key to that holding was the fact that the injured inmate could not turn anywhere but to the state for his care and treatment, 487 U.S. at 55, just as foster child Keena White could turn to no one else but her state appointed foster parents. Furthermore, Keena's natural mother could turn to no one but the state with her complaints that Keena was in need of care and treatment, and her complaints that Keena was at risk of abuse and neglect in foster care. She was not free to remove her child from the foster home and transport her to a physician or to a qualified care giver. The White's had no choice but to deal with the state; and it was a Hobson's choice at best, because it was no choice at all.

To say that no state action lies in a court-ordered foster care placement is a logical fallacy. The state enacted the South Carolina Child Protection statute which allowed DSS to petition the court to remove Keena from her home and also empowered DSS to license, train and monitor foster parents. Keena White was ordered into foster care by a South Carolina Family Court, and could only be released from foster care by a South Carolina Family Court. The state is as much present in Keena White's case as were the state courts that enforced discriminatory private covenants in Shelly v. Kraemer, 334 U.S. 1 (1948). Keena White's placement in the hands of foster parents was possible only because it was judicially enforced. The state was present and was responsible for her safety from the moment the sheriff's deputy carried her out of her home until the moment she drew her last breath.

This case is not a licensing case like Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), where the mere granting of a state license standing alone does not give rise to state action. Where foster care is concerned, the state does much more than simply grant a license. The state in effect certifies a private home as a treatment or holding facility, and the home deals exclusively with the state and discharges some of the responsibilities that the state assumes by seizing a child. The state selects, trains, monitors, and supervises the foster parents and the foster homes in order that the state's child protection laws are carried out. The State bore an affirmative obligation to provide adequate care to Keena White. The State delegated that function to her foster parents, and the foster parents, in exchange for a public benefit, voluntarily assumed that obligation. The fact that foster parents are not full-time, permanent state employees does not render them purely private actors. Foster parents are fully vested and in effect deputized with state authority to fulfill essential aspects of the duty, placed on the State by the Eighth Amendment and state law, to provide essential care to children the State has seized and taken into custody. Foster parents must be considered state actors. See West, 487 U.S. at 57. In this case, however, the White family could not freely terminate the state-compelled foster care arrangement, and the foster parents drew monthly board payments from the state. Likewise, the Record alleges the statutory and regulatory interdependence between South Carolina foster homes and the state which mandates the selection, training, and monitoring procedures which must be undertaken, as well as the detailed description of duties set forth in the foster parent contract.

The differences between the instant case and Milburn are far from small, as several circuits have recognized. Milburn simply does not provide a convenient one-size-fits-all answer to the question of whether foster parents are state actors or act under color of law. See e.g. Taylor ex rel. Walker v. Ledbetter, 818 F.2d 791 (11th Cir. 1987); Meador v. Cabinet for Human Resources, 902 F.2d 474 (6th Cir. 1990); L.J. ex rel. Darr v. Massinga, 833 F.2d 118 (4th Cir. 1988); Doe v. New York City Dept. of Soc. Serv., 649 F.2d 134, 141-142 (2d Cir. 1981), on remand, 709 F.2d 782, cert. denied sub nom. Catholic Home Bureau v. Doe, 464 U.S. 864 (1983). Milburn was decided immediately after DeShaney v. Winnebago County DSS, 489 U.S. 189 (1989) and used the reasoning set forth in DeShaney to decide the case rather than applying the case law set forth in cases such as Youngberg and Estelle which govern situations where the state has assumed custody of an individual. Milburn clearly states that DeShaney is controlling and the essential facts are indistinguishable.

In DeShaney, the Court found no duty to protect against private violence even if the state knew of danger to a specific individual. DeShaney emphasized that "the affirmative duty to protect arises not from the state's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitations which it has imposed on his freedom to act on his own behalf, through imprisonment, institutionalization, or other similar restraint of personal liberty." 109 S. Ct. at 1006. Joshua DeShaney was in the custody of his father, not the state. Likewise, Milburn stated that "the State of Maryland, by the affirmative exercise of its power, had not restrained the plaintiff's liberty; he was voluntarily placed in the foster home by his natural parents." 871 F.2d at 476. Unlike Maryland, South Carolina did restrain Keena's liberty and Cindy White's right to her child's custody, the most fundamental personal liberties of both Keena and Cindy White. This is precisely the restraint of freedom that the DeShaney Court said triggers the corresponding affirmative duty to provide adequate protection. DeShaney, 109 S. Ct. at 1006 (citing Estelle v. Gamble, 429 U.S. 97 (1976); Youngberg v. Romeo, 457 U.S. 307 (1982)).

The Fourth Circuit has now held that nothing in Milburn limited its application to voluntary placement (Op. at 12). However, the facts and the ratio decidendi of Milburn are inextricably grounded on a voluntary placement that lacked the affirmative exercise of state power against the individual. The Whites' ability to provide for their own needs was stripped away without any safety or protection provided by the state. The White ex parte Order States: "IT IS THEREFORE ORDERED that emergency protective custody, and the temporary care and control of the minor children Daniel, Darren, Deidre, Clifton, Patric, Keena, be awarded to Aiken County Department of Social Services and that the Department shall exercise temporary custody, placement, planning and supervision of said children." The temporary order of December 4, 1991 holds: "That custody of the minor children shall be with DSS pending the merit's hearing . . . .". All Defendants also admitted in their Answers that the White children were in the legal custody of DSS and its agents from December 3, 1991 until Keena's death on January 18, 1992.

The state's affirmative exercise of its power, by taking the White children into custody, created an affirmative duty of protection, and required the provision of reasonable safety, food, and shelter, all of which the State delegated to the Bonners. Youngberg; Estelle. As the Supreme Court explained in West v. Atkins, 497 U.S. 42 (1988), this is the nexus that creates state action which will sustain an action under § 1983. In

Andrews v. Federal Home Loan Bank of Atlanta, 998 F.2d 214, 218 (4th Cir. 1993), the Fourth Circuit described four instances where private parties can be state actors subject to § 1983. The second situation applies in the White case: "(2) When the state has sought to evade a clear constitutional duty through delegation to a private actor." Andrews, 998 F.2d at 217. The Fourth Circuit discussed West and stated: "Government cannot evade constitutional duties by delegating the responsibility to a private contractor." 998 F.2d at 218. See also Mitchell v. Aluisi, 872 F.2d 577 (4th Cir. 1989). The Fourth Circuit's decision in White neither distinguishes nor considers West, nor the conflicting Fourth Circuit opinions, nor addresses the critical fact that the White children were involuntarily seized and removed from the custody and care of Cindy White by a direct and forcible exercise of State power and authority. Even Defendants admit that Keena was in state custody.

No State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961). While the state may delegate its authority, it may not delegate its accountability, yet that is what the Fourth Circuit has held to be constitutionally permissible. Government, be it federal, state, or local, exists for essentially two reasons: to perform necessary social functions which cannot be done efficiently by the private sector, and to perform necessary social functions which cannot be left to private actors due to a high risk that the public interest will not be served. Foster care falls into the latter category. It is state regulated for the sole purpose of protecting children from both abusive parents and abusive foster parents. When a baby like Keena White dies from multiple blows to the head in an overcrowded, unfit, unsupervised foster home, the state that placed her there must be held to answer.

White is not a "promise" case like Jensen v. Conrad, 747 F.2d 185 (4th Cir. 1984), which the Supreme Court has denounced, but is a true "custody" case invoking constitutional protection because of the state restraint of the Petitioners' liberty. In fact, the liberty and freedom restrained in White, under the reasoning of Youngberg, would exceed those of prisoners who had violated the law and mental patients who had been committed to state institutions, although due to no fault of their own. In White, there was no merits hearing or opportunity to determine if the restraint was justified, and even if justified, Keena had committed no crime nor behaved improperly.

2. The State's Custodial Relationship with the Foster Child Imposes an Affirmative Duty of Reasonable Protection in a Child's Placement as Well as While the Child Is in Foster Care.

By taking Keena White into legal and physical custody, the state assumed and incurred an affirmative duty of protection that required the provision of reasonable safety, food, and shelter, all of which the State delegated to the foster parents. The right to personal security constitutes a "historic liberty interest" protected substantively by the Due Process Clause of the Fourteenth Amendment, and that right is not extinguished by lawful confinement, even for penal purposes. If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it follows a fortiori that it is unconstitutional to confine the involuntarily committed -- who may not be punished at all -- in unsafe conditions. Youngberg, 457 U.S. at 315-316 citing Ingraham v. Wright, 430 U.S. 651, 673 (1977); Hutto v. Finney, 437 U.S. 678 (1978). When the State, by the affirmative exercise of its power, so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs -- e.g., food, clothing, shelter, medical care, and reasonable safety -- it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. Deshaney, 489 U.S. at 199, citing Estelle, 429 U.S. at 103-104; Youngberg, 457 U.S. at 315-316.

Thus, by taking custody of Keena White, the State bore a constitutional duty to reasonably protect her against harm inflicted by its agents and against any other dangers it might create or expose her to. This is not to say that a foster child, or any other person in state custody is entitled to absolute safety, or that the state is strictly liable for any harm the person might suffer. An inadvertent failure to provide adequate care could not be said to constitute an unnecessary and wanton infliction of pain or to be repugnant to the conscience of mankind. Estelle, 429 U.S. at 106. However, liability should be imposed when decisions by those charged with the care and control of one in custody are such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment. Youngberg, 457 U.S. at 323. See also 457 U.S. at 312 n.11 (explaining that the deliberate indifference standard adopted in Estelle v. Gamble was erroneously used outside the penal context). In this case, there are national standards recognized by DSS Defendants, such as the Child

Welfare League standards, which are almost identical to the South Carolina Child Protection Statutes, DSS policy and procedure, and the licensing requirements.

In this case, the Fourth Circuit erroneously applied a heightened and improper standard of proof to the facts. The proper standard for liability in this case is not whether the Defendants were deliberately indifferent to the rights of the Plaintiffs, but whether they failed to exercise reasonable professional judgment in the discharge of their duties and deviated substantially from national standards. However, the Record supports liability in this case under either standard, and qualified immunity is therefore improper.

By seizing Keena White, isolating her from her family, and forcing her into a dangerous and unsupervised foster home, the state so far departed from any professional standard of judgment that her violent death, although shocking, is unsurprising. The foster parents had no foster parent training, had too many children in the home, had previously abused foster children by striking them on their heads with bare knuckles (the cause of Keena's death), hitting at least one child with a brick and causing a gash requiring stitches, locking children in closets, and hitting them with shoes. The foster parents drank excessively, routinely used profanity in front of children, and fought physically, at times knocking holes in the walls of their home. The state failed to discover these facts before placing Keena White in the house because it rarely visited the home or the other foster children, did not obtain foster child medical records (which was required by statute and would have revealed that a child was hit with a brick), and did not adequately investigate the foster parents prior to licensing them. Only the state has the authority, duty, and responsibility to license foster homes. The names of foster parents are confidential; no one else can check behind DSS. Only the state had the authority to place Keena in her foster home.

In White, the Defendants created the dangerous situation in which they placed Keena by their inadequate licensing and supervision of the home, duties for which they were directly responsible. Under the present system, the State does nothing more than tell potential foster parents: "Fill out a form and we'll give you some children." The state fails to properly investigate the backgrounds and qualifications of foster parents, fails to train them, and fails to supervise them by making the required visits to foster homes. So many children have died in Aiken County foster homes that the county DSS director was fired, caseworkers were criminally

charged, and the agency was investigated by state DSS and law enforcement. These Defendants conducted the investigations and prepared the reports that found numerous caseworkers admitted to willful violations of procedures and law, that all foster child deaths in Aiken County could have been prevented, and that the agency was in a legally indefensible position. Defendant Dunnam was hired to replace the fired director.

The Defendants had a duty and responsibility to reform South Carolina's dangerous foster care system. The White decision states that none of the Defendants knew or suspected that the Bonners were abusive. (Op. at 10). DSS cannot bury its head in the sand by failing to properly license, train, inspect, and supervise foster parents, and claim innocence when the obvious danger it creates causes injury time after time.

Closely related to the DSS failure to properly select, license, train and monitor foster parents, is DSS's responsibility to monitor Keena's safety and well being after she is placed in foster care. The Fourth Circuit again said there was no duty of safety or well being from the private violence of foster parents. State statute as well as national standards require regular visits to the child and foster home. Not only did DSS fail to make the required visits, DSS had not visited the other foster children in the Bonner home, nor monitored their medical records. Further DSS never started even one investigation of abuse to Keena in foster care although Cindy White, her mother, reported repeated injuries including bruises, several bite marks, a cut under eyes, a knot on her forehead, and respiratory congestion. The Fourth Circuit at oral argument dismissed these as normal childhood injuries although Keena was only ten months old. Her mother felt strongly enough about her children's safety to contact the Aiken County Delegation, Senator Storm Thurmond and State DSS when Aiken County DSS refused to help her. She did all of this within four weeks because she realized the seriousness of the danger. State law as well as national standards set forth a procedure for investigating reports of abuse. These investigations are handled by a different part of DSS from the child's foster care worker, a person trained in child abuse investigation; there are forms to be completed which help asses the risk to the child. These procedures were never even started. The caseworkers did not have the right and could not make a decision on Cindy White's, Senator Thurmond's, and the Delegation's reports of abuse. Keena was too young to seek help from a neighbor or a school teacher. Without DSS's visiting and monitoring and investigating when others believed she was in danger, Keena was helpless in a system created and controlled by DSS. Likewise, Cindy White was

helpless. She cried out for help from every source as she watched and waited for her baby to die. The Fourth Circuit says this is acceptable; the state (DSS) had no duty to act because the foster parents were private actors. If Nicholas Romeo had new injuries on him, or a prisoner continuously had injuries, this Court would not allow such conduct to continue. Estelle, 429 U.S. 97; Youngberg, 457 U.S. 307.

The Defendants exercised State power and restraint over Keena, placed her in the clutches of the Bonners, and failed to protect her. They tossed her to the lions and turned their backs as she was devoured.

3. The Fourth Circuit Erroneously Applied a Higher Standard of Liability to this Case.

The Fourth Circuit also did not apply the correct standard of review because such action is inconsistent with it's holdings in Winfield v. Bass, 106 F.3d 525 (4th Cir. 1997); Buonocore v. Harris, 65 F.3d 347 (4th Cir. 1995); Finelli v. Tabb, 67 F.3d 67 (4th Cir. 1995); and the U.S. Supreme Court's holding in Johnson v. Jones, 115 S. Ct. 2151 (1995). On an interlocutory appeal from a denial of qualified immunity the only issue that may be determined is whether the official's conduct violated clearly established law. Winfield, 106 F.3d at 529. The Fourth Circuit stated that the White's claim to a constitutional right to safe placement falls short on the facts (Op. at 10), because the Fourth Circuit required either actual knowledge or suspicion of prior abuse by foster parents, followed by a deliberate failure to act. This, however, is neither the prevailing nor the appropriate standard. Taylor and Doe both recognize a § 1983 cause of action for failure to act when the duty to act exists, Taylor, 818 F.2d at 796, and both cases held that agencies and individual defendants who deliberately fail to learn what is going on in foster homes can be liable. Taylor, 818 F.2d at 796-97; Doe, 649 F.2d at 145. Both also found top supervisors to be deliberately indifferent to a known injury, a known risk, or a specific duty and that their failures to act proximately caused the plaintiffs' injuries. Doe specifically acknowledged the DSS employees' statutory duty to protect children. Id.

Doe further explains that repeated acts of negligence can be evidence of indifference, 649 F.2d at 142, and that DSS employees can be charged with knowledge of unconstitutional conditions when they persistently violate their statutory duty to inquire about such conditions and to be responsible for them. 649 F.2d at 145. The more specific the statute

or regulation, the stronger the inference of deliberate indifference in its violation. 649 F.2d at 146. The White Plaintiffs have alleged and factually supported numerous licensing, training, and supervision violations regarding the Bonners, as well as chronic licensing, training, and supervising violation of foster homes throughout Aiken County. The Plaintiffs have offered reports prepared for and by Defendants Solomon, Dowd, Foley, Lewis, Schaekel, Council, and Dunnam that describe a systematic pathology of deplorable regulatory failures within ACDSS foster care. In their respective depositions, the Defendants barely admit reading the reports, but certainly offer no testimony of corrections. The agency itself found that background checks of foster parents were inadequate, that training was not conducted, and that home visits were not made. These self-assessing reports found these chronic abuses to be so pervasive and routine as to be considered criminal and legally indefensible, and that the violations of state law, policy, and procedure had caused the injury and death of Aiken County foster children for several years prior to Keena White's death. In fact, the last such foster child died the same month the White children were seized, with problems noted on November 8, 1991 at the agency, but nothing was done to correct those problems prior to Keena's death on January 18, 1992. The Record reveals that the Defendants failed to fulfill virtually every duty they owed to Keena[1]; Defendant Solomon was in fact "directed to take all appropriate and necessary action to ensure that the Aiken County Department of Social Services is immediately in full compliance with [all laws and regulations]." Yet he continued to rubber-stamp foster homes licenses without verifying or checking any of the applications. Instead of making any independent verifications Solomon relied on his subordinates despite the fact he had no knowledge of

---

[1] The manifest failures in the various Defendants' obligations to the Whites can be located in detail as follows: Graham -- J.A. 362-68, 382-402 with exhibits through 580, 1388-92, 1415-17; Chamblis -- J.A. 589-95, 605-19 with exhibits through 720A; Werts -- J.A. 418-20, 735-38, 741-55, 1414-15; Gilchrist -- J.A. 764-73, 777-92 with exhibits through 824, 1412-14; Wilson -- J.A. 1138-42, 1151-70 with exhibits through 1186; Dunnam -- J.A. 1096-1097, 1204-24 with exhibits through 1258, 1417; Foley -- J.A. 843-45, 883-95, 916-1097; Dowd -- J.A. 841-42, 871-72, 874, 881-82, 884-95, 916-1097; Lewis -- J.A. 843, 874, 883-95, 916-1097; Solomon -- J.A. 838-40, 327-28, 874-81, 884-95, 916-1097; Schaekel -- 841, 874, 883-95, 916-1097; Council -- 842-43, 874, 883-95, 916-1097.

procedures used and did not monitor employees of Aiken County DSS. Moreover, Dunnam admitted in her deposition to having seen the reviews detailing problems at the ACDSS and merely stated two years later that "there's not going to be overnight stability," and while she was aware of problems with ACDSS, she made no effort to fix the problems in the foster home system that were contributing to the death of children. Defendant Foley stated in her deposition that it was her responsibility to make sure counties were implementing policies and procedures that complied with the law. It was clear from the numerous reviews that ACDSS was not in compliance. Thus, even if the heightened standard of deliberate indifference controls this case, the Record supports it and the Defendants should be taken to trial.

Moreover, the Petitioners raise material issues of fact as to the Defendants' knowledge of the serious risk of harm in unsupervised, improperly licensed foster homes. The determination of this "is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence . . . ." Farmer v. Brennan, 511 U.S. 825, 842 (1994); Brice v. Virginia Beach Correctional Ctr., 58 F.3d 101 (4th Cir. 1995). It need not be shown that the Bonners posed a risk to Keena individually. Farmer, 511 U.S. at 843. DSS knew that its policy of not supervising, not investigating, and improperly licensing foster homes had already caused children to die. DSS also knew that the Bonners were improperly licensed. Warehousing children with unfit foster parents is an obvious danger from which a trier of fact could conclude that the Defendants were deliberately indifferent, especially in light of the deaths that DSS's omissions had already caused.

All the cases construing the duty of safe placement trace their roots to Youngberg, which requires only that a defendant knew or should have known of a danger of abuse. Furthermore, Youngberg requires only lack of professional judgment, not deliberate indifference. Youngberg distinguished the line of prisoner safety cases from the institutional safety cases; in so doing, the Supreme Court reasoned that "[p]ersons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions are designed to punish." 457 U.S. at 321- 322. Accordingly, the Court applied the more lenient standard of professional judgment for non-penal § 1983 suits.

II. THE FOURTH CIRCUIT'S DECISION THAT SUTER V. ARTIST PRECLUDES PRIVATE ENFORCEMENT OF ALL SECTIONS OF THE AACWA IS IN DIRECT CONFLICT WITH U.S.C. SECTION 1320a-2 AND PRIOR SUPREME COURT HOLDINGS AND IS PATENTLY WRONG.

Some sections of the Adoption Assistance and Child Welfare Act of 1980 (AACWA) create federal statutory rights that are privately enforceable. The Fourth Circuit erroneously concluded that the Petitioners asserted violations of only one Section of the AACWA, 42 U.S.C. § 671(a)(10), and that the subsection creates no private cause of action for violations. (Slip Op. at 14). However, the Petitioners raised facts in the Record below which support violations of several specific AACWA provisions that the Fourth Circuit had previously held to be actionable in Darr, 838 F.2d 118. For instance, the State Department of Social Services' failures to monitor the county department violated § 671(a)(7); its failures to establish a case plan for the White Children violated § 671 (a)(16); and its failures to properly license the foster home violated § 672(c).

The court also misconstrued the breadth of this Court's decision in Suter v. Artist, 112 S. Ct. 1360 (1992) (superseded by 42 U.S.C. § 1320a-2 (1994)), (Suter was decided after the events in White) and Congress's partial reversal of that decision. Suter presently means only that § 671(a)(15) is not privately enforceable due to the "reasonable efforts" language employed by that section. See Marisol A. By Next Friend Forbes v. Giuliani, 929 F. Supp. 662 (S.D.N.Y. 1996) ("only the narrow holding in Suter remains and this Court must rewind the clock and look to cases prior to Suter to determine the enforceability of the provisions at issue in the instant case."); Jeanine B. By Blondis v. Thompson, 877 F. Supp. 1268 (E.D. Wis. 1995) ("the court must rewind the clock and look to cases prior to Suter to determine the enforceability of other provisions of the Adoptions Assistance Act.").

The court also noted that § 1320a-2 was enacted after the instant case was commenced, and thus would not apply. However, § 1320a-2 operates retroactively: "The amendment made by [this section] shall apply to actions pending on the date of the enactment of this Act . . . ." Pub. L. No. 103-382 § 555(b), 108 Stat. 4058 (1994). Thus, whether Congress's response to Suter came after this case was filed is of no moment. Congress has turned back the clock and reinstated pre-Suter AACWA decisions,

which means that Darr is once again the law of this Circuit, and the duties of the Respondents have been clear and certain since at least 1961.

By reversing part of Suter, Congress has decreed that the courts should revert back to the analysis set forth in Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498 (1990), in determining whether or not a statute creates a privately enforceable right. The Fourth Circuit, however, failed to apply the Wilder test to the various provisions of the AACWA cited by the petitioners. In Wilder, The Supreme Court formulated a three part test to determine whether a statutory provision created a privately enforceable right. The court must consider: (1) whether "the provision in question was intend(ed) to benefit the putative plaintiff"; (2) whether the provision "reflects merely a congressional preference for a certain kind of conduct rather than a binding obligation on the government unit"; (3) whether "the interest of the plaintiff asserts is too vague and amorphous such that it is beyond the competence of the judiciary to enforce." Wilder, 496 U.S. at 509.

Once these factors have been met, the burden shifts to the state actor to show congressional intent to the contrary. See Wright v. City of Roanoke Redevelopment and Hous. Auth., 479 U.S. 418, 423-24 (1987). Generally, "§ 1983 provides a remedial cause of action unless the state actor demonstrates by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement" Id. This requires defendants to show that Congress provided "a comprehensive enforcement mechanism for the protection of the federal right" with which plaintiff's § 1983 action would be inconsistent. Harris v. James, 883 F. Supp. 1511, 1518 (M.D. Ala 1995). A showing of the availability of administrative protection is insufficient to meet this burden. .See Id. The Supreme Court has warned that courts should "not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for the deprivation of a federally secured right." Wright, 479 U.S. at 423-24. Had the Fourth Circuit applied the Wilder test, it would have found that the provisions cited in Darr and this case meet the test and in fact do created privately enforceable rights.

Several lower courts have addressed the issue of whether, after Suter and the corresponding Congressional amendment, the Adoptions Assistance and Child Welfare Act does in fact create privately enforceable rights. In Marisol, the district court reasoned that with respect to alleged violations of § 671(a), the Wilder test is met:

> With Respect to the first Wilder factor, it is clear that the members of the proposed class of plaintiffs are the intended beneficiaries of the Adoptions Assistance Act. Second, the language of § 671 (a) is mandatory and imposes a binding obligation by explicitly tying the creation of certain features of a state plan to federal funding. Finally none of the subsections of § 671(a) relied upon by plaintiffs is so vague or amorphous as to make judicial enforcement impossible. Both § 671(a)(10) and (a)(16) are clear and are not beyond the power of the Court to enforce. ... Additionally this court finds no evidence that Congress has indicated its intent to preclude private plaintiffs from seeking to enforce provisions of the Adoptions Assistance Act other than § 671(a)(15)."

929 F. Supp. at 683. Plaintiffs in the current action have similarly alleged facts supporting violations of § 671 (a)(10) and (a)(16). In its decision, the Fourth Circuit is in direct conflict with the court in Marisol in its holding that § 671(a)(10) is too vague and amorphous to be enforced by the Court.

In Jeanine B., the district court also found that § 671(a) created privately enforceable rights:

> Applying the first of the Wilder factors to this case, it is clear and undisputed that the children bringing this lawsuit are the intended beneficiaries of the Adoptions Assistance Act. As for the second factor, Congress imposed a binding obligation by explicitly tying the creation of certain features of a state plan to federal funding. The scheme and the language of § 671(a) are mandatory, and the theory of Suter - that when Congress sets out plan requirements the only enforceable right is to the plan itself and not to its implementation - has been rejected by Congress itself - the body whose intentions must be interpreted. The second prong of Wilder is met. Finally, with the exception of §671(a)(15), the provisions of §671 (a) are not too "vague and amorphous" that it is beyond the competence of the judiciary to enforce."

877 F. Supp. at 1283-84. The court then specifically held that §§ 671(a)(2), (3), (7), (10), (11), and (13) and §627 were not too vague or amorphous or beyond the court's ability to understand and enforce. Again, the Fourth Circuit's decision that § 671(a)(10) is too vague and amorphous to judicially enforce is in direct conflict with the Jeanie B. court. See also Harris, 883 F. Supp. 1511; Davis v. McClaran, 909 S.W.2d 412 (Tenn. 1995); Norman v. McDonald 930 F. Supp. 1219 (N.D.Ill. 1996).

In this case, the Supreme Court would have the opportunity to clarify the impact of the congressional statute's impact on this Court's decision in Suter and to clarify whether, as held in Darr and the cases cited above, sections in the AACWA create privately enforceable rights.

III. THE FOURTH CIRCUIT FAILED TO RECOGNIZE PLAINTIFFS' PROCEDURAL DUE PROCESS CLAIMS AND IS IN DIRECT CONFLICT WITH OTHER CIRCUIT COURTS AND THE SUPREME COURT

The Petitioners do not assert, as stated at page 12 of the Slip Opinion, a substantive claim based on the South Carolina Child Protection Act. Petitioners do assert a denial of procedural due process resulting from an inadequate investigation before the White children were removed and while they were in custody as well as failure on behalf of the Defendants to comply with State statutory requirements which would have protected the White children from abuse at the hands of their foster parents. In Board of Regents v. Roth., 408 U.S. 564 (1972), the Supreme Court explained:

> The Fourteenth Amendment's procedural protection of property as a safeguard of the security of interests that a person has already acquired in specific benefits ... To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Id at 576-577.

In DeShaney, the Supreme Court recognized the possibility of such a claim attaching to a state's child welfare statutes under a Board of Regents v. Roth evaluation. The Supreme Court held that the substantive portion of the Fourteenth Amendment did not require the State to protect a child from his or her parents, however, the Supreme Court then noted in footnote two (2) that:

> Petitioners also argue that the Wisconsin child protection statutes gave Joshua an "entitlement" to receive protective services in accordance with the terms of the statute, **an entitlement which would enjoy due process protection against state deprivation** under our decision in Board of Regents v. Roth, 408 U.S. 564 (1972).... But this argument is made for the first time in petitioner's

> brief to this Court: it was not pleaded in the complaint, argued to the Court of Appeals as a ground for reversing the District Court, or raised in the petition for certiorari. We therefore decline to consider it here.

489 U.S. at 196 n.2. (emphasis added).

Following the Supreme Court's analysis in Roth and DeShaney, the Court must look to State law to determine whether or not the State has created an entitlement in children who are the subject of reports of suspected abuse to an adequate and thorough investigation and to be protected during the investigation. If the state has created this entitlement, then the Court must determine whether the Plaintiff was denied that right without due process. If the court finds that the state denied Plaintiff her right to an adequate and thorough investigation and to be protected during that investigation without due process, the Defendants may be held liable for that violation under the Fourteenth Amendment.

Lower courts faced with the question of whether or not various state child welfare statutes give children an entitlement to protective services which would enjoy procedural due process protection against state deprivation are divided. See Meador, 902 F.2d at 476-477, (holding Kentucky child protection statutes give plaintiffs entitlement to protective services of which they may not be deprived with due process of law), cert. denied, 498 U.S. 867 (1990); Taylor, 818 F.2d at 798-800, (holding children in foster care can state claim based upon deprivation of liberty interest when officials fail to follow guidelines mandated by Georgia foster care and placement scheme); Powell v. Georgia Dep't of Human Resources, 918 F. Supp. 1575, 1580-82 (S.D. Ga. 1996) (holding comprehensive and mandatory nature of Georgia Child Abuse Protocol vests abused children with constitutionally protected entitlement to procedures and protections mandated therein); Eric L. ex rel. Schierberl v. Bird, 848 F. Supp. 303, 308 (D.N.H. 1994) (refusing to dismiss plaintiff's claims that New Hampshire child protection statute creates entitlement to certain services); Baby Neal v. Casey, 821 F. Supp. 320, 338-39 (E.D. Pa. 1993) (denying summary judgement on plaintiff's procedural due process claims); Chrissy F. ex rel. Medley v. Mississippi Dep't of Pub. Welfare, 780 F. Supp. 1104, 1127-1129 (S.D. Miss. 1991) (holding provisions of Youth Court law at issue created property interests enforceable under the due process clause), aff'd in part, rev'd in part, 995 F.2d 595 (5th Cir. 1993); Marisol, 929 F. Supp. 622 (holding that New York's Child Protective Services laws are more than

mere procedural guidelines and give plaintiffs an entitlement to protective services of which they can not be deprived without due process). But see Tony L. ex rel. Simpson v. Childers, 71 F.3d 1182 (6th Cir. 1995) (holding Kentucky child abuse reporting statute does not vest plaintiffs with constitutionally-protected property interest), cert. denied __ U.S. __ (1994); Doe ex rel. Nelson v. Milwaukee County 903 F.2d 499, 502-05 (7th Cir. 1990) (holding that Wisconsin child abuse reporting statute does not vest plaintiffs with constitutionally-protected property interest) Coker ex rel. Coker v. Henry, 813 F. Supp. 567, 569-70 (W.D. Mich. 1993) (holding Michigan child protection law not sufficiently explicit and mandatory to create claim of entitlement to protective services) aff'd, 25 F.3d 1047 (6th Cir. 1994); B.H. v. Johnson, 715 F. Supp. 1387, 1399-1400 (N.D. Ill. 1989) (holding plaintiffs have no constitutionally protected liberty or property interest in Illinois Abuse and Neglected Child Reporting Act); Child v. Beame, 412 F. Supp. 593, 604-05 (S.D.N.Y. 1976) (holding plaintiffs have no constitutionally protected property interest in permanent adoptive placement).

The State of South Carolina has chosen to create such an entitlement in children who are the subject of a report of abuse: S.C. Code Ann. §§ 20-7-650 (B) (must be staffed adequately with persons trained in the investigation of suspected child abuse and neglect and in the provision of services to abused and neglected children and their families), 20-7-650(I) (the local child protective service agency is charged with providing, directing, or coordinating the appropriate and timely delivery of services to children found to be abused or neglected and those responsible for their welfare), and 20-7-650(O) (the agency in all instances shall act in accordance with the policies, procedures, and regulations promulgated and distributed by the State Department of Social Services pursuant to this chapter) (emphasis added). These policy and procedures give detailed requirements for the monitoring of foster children and foster homes. When this right is arbitrarily denied a child without adequate due process, then that child's constitutional rights have been violated.

The South Carolina Child Protection Act, S.C. Code Ann. § 20-7-480 et. seq., imposes upon the local child protection agency and its social workers a special duty to investigate and intervene in cases involving child abuse, and a violation of that duty may give rise to a private cause of action. Jensen v. Anderson County Dep't of Soc. Serv., 403 S.E.2d 615 (S.C. 1991). This affirmative duty creates a property interest that runs to children like the Plaintiffs who are the subjects of reports of suspected abuse.

"Property interests.. . are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Board of Regents v. Roth 408 U.S. at 577. Procedural due process rights arise when a party has been deprived of a recognized property or liberty interest without the procedural protection of the Fourteenth Amendment. Baby Neal, 821 F. Supp. 320.

In Jensen, the South Carolina Supreme Court held that, while generally there is no common law duty to act, an affirmative legal duty may be created by statute. 403 S.E.2d at 617. The court then analyzed § 20-7-650 of the South Carolina Code. and found that:

> The essential purpose of these sections is to protect abused children when their cases have been reported to DSS officials. Such children comprise a clearly identifiable class; Michael Clark was plainly a person within the class. These sections impose on the local child protection agency and its social workers a specific duty to investigate and to intervene in cases involving children like Michael.

403 S.E.2d at 618. The Court then concluded that these statutory sections gave rise to a private right of action when violated. 403 S.E.2d at 620. See also Babcock v. State, 809 P.2d 143 (Wash. 1991) (requiring caseworkers to act in accordance with statutory and regulatory procedures in every respect, and that their actions had to be reasonable and that their statutory duties required their actions.)

Conversely, when South Carolina social workers violate their duty to thoroughly and adequately investigate reports of suspected child abuse and, as a result, improperly remove a child and place him or her in grave danger, they deprive the children of their procedural due process rights as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

> Where a state statute mandates that officials take certain affirmative actions to ensure the well-being and promote the welfare of a child, that child can state a due process claim based upon deprivation of a property interest where officials have failed to follow the statutory mandate.

Chrissy F., 708 F. Supp. at 1128 (S.D. Miss. 1991).

The Constitution, of course, creates no property rights. But where the state creates a liberty or property interest, and later divests the holder of that interest without proper procedural mechanisms, constitutional liability can be vindicated under § 1983, which is the nature of the claim at issue here. The Respondents are responsible for the selection, investigation, training, and supervision of foster homes and foster children, in order to protect helpless foster children who are isolated in state custody. The Respondents could not arbitrarily deprive Keena White of these vested entitlement, see Jensen, 403 S.E.2d 615, without violating the procedural guarantees of the Constitution.

IV. THE QUESTIONS PRESENTED ARE IMPORTANT BECAUSE THEY CONCERN A FUNDAMENTAL RIGHT OF VAST NUMBERS OF CHILDREN AND FAMILIES, INVOLVE THE ADMINISTRATION OF A COSTLY FEDERAL PROGRAM, AND IMPLORE THE COURT TO CLARIFY DESHANEY V. WINNEBAGO COUNTY DSS.

This case is important and should be heard because it begs the court to clarify the contours of a child's fundamental constitutional right to reasonable safety while in the custody of the state. Most compelling is that it affects children who are wholly unable to help themselves. A child cannot handwrite a petition to any court, like the prisoner-petitioner who petitioned this Court in Estelle. Children like Keena White have no choice but to rely on the humanity of their keepers.

This case is not just about Keena White. It is about all the Keena Whites in state custody right now. It is about the 9,400 South Carolina children who spent an average of twenty-eight months in foster care at the same time Keena White was in foster "care." After South Carolina passed legislation in 1993 forbidding convicts and prior child abusers from being licensed foster parents, 160 children had to be removed from fifty homes. This case concerns them, because many bear the scars of their placements.

Over one-half million children were in foster care nationally at the same time Keena White perished in that institution. Twenty-three states found themselves answering to federal courts that year because of problems in their foster care systems. This case is about those children, and about those who have since been seized by the states for their own protection.

When Keena White was slain in her foster home, sixty eight of her fellow South Carolina foster children were abused or neglected by the foster parents who were supposed to protect them from their natural parents. Over the three-year period preceding Keena's untimely demise, 122 South Carolina foster children suffered in silence. This case is about them. Just to the north, ninety-six North Carolina children endured abuse or neglect in foster homes in 1993. Five South Carolina children died of abuse or neglect in foster homes from 1991 to 1994. This case is about them, not just Keena White.

This case is about the $38 million North Carolina spends on foster care, and the $31.8 million South Carolina will spend this year. It is about the $ 1.5 billion that the Adoption Assistance and Child Welfare Act will provide to the States for foster care and adoptions, and the administration of those funds and their mandates.

This case asks the Court to reinforce its holdings in West v. Atkins, Estelle v. Gamble, and Youngberg v. Romeo. No extension of law is sought, nor is one needed. It has long been the law of the land that once a state invades an individual's liberty, properly or otherwise, it assumes a constitutional duty to reasonably look after the welfare of its ward. But the unfortunate fact is that many defendants have misused the Court's teachings in DeShaney v. Winnebago to escape the clear command of the Eighth Amendment and Fourteenth Amendment as set forth in Estelle, Youngberg and their progeny. In DeShaney, the Court refused to extend the proscriptions of the Fourteenth Amendment outside custodial relationships, and declined to address the duties that would attach to the custodial relationship created by state foster care, on the facts of that case. 489 U.S. at 202 n.9. However, the Court explained that such duties could attach if the facts of the case were otherwise: "It is the State's affirmative act of restraining the individual's freedom to act on his own behalf - through incarceration, institutionalization, or other similar restraint of personal liberty - which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means." 489 U.S. at 201. DeShaney also emphasized "it [the State] played no part in their creation, nor did it do anything to render him any more vulnerable to them." Id. at 201.

In this case, the proper facts are present, and the confusion and disarray created by those who have misapplied the clear authorities

explained yet again in DeShaney can perhaps be finally settled. This case presents the facts necessary for the Court to take up where it left off in DeShaney.

Keena and Cindy White lived in Aiken, South Carolina, on the southern edge of the Fourth Circuit, where a state can apparently seize a child and ignore her welfare with absolute impunity. Had the White's lived just eight miles South in the Eleventh Circuit, where a state must account for failures of its affirmative duties because the Fourteenth Amendment, Youngberg, and Estelle are given for their plain and uncomplicated meaning, see, Taylor, 818 F.2d 791, Keena's death might have been prevented; but had it not, this ultimate deprivation of her most fundamental rights would have properly been vindicated. So long as there is even one child in such danger, this is an important matter which should be decided by this Court.

CONCLUSION

Certiorari should be granted in this case because several Circuits disagree as to whether foster children are in state custody, whether foster parents act under color of law, and whether the state owes an affirmative duty of protection to foster children. The White decision also conflicts with applicable decisions of this Court. The Decision of the Fourth Circuit was erroneous, and this case poses important questions that affect numerous families and governments, as well as the administration of costly federal and state social programs.

Respectfully Submitted,

SALLY M. WALKER
Attorney for Petitioners
1518 Pickens Street
Columbia, South Carolina 29201
(803) 254-1677